

ORIGINAL

20060174

IN THE SUPREME COURT

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

STATE OF NORTH DAKOTA

MAR 14 2007

STOCKMAN BANK OF MONTANA, a)
Montana banking corporation,)

STATE OF NORTH DAKOTA

Plaintiffs/Appellant)

vs.)

AGSCO, INC., a North Dakota corporation, and)
Capital Harvest, Inc., d/b/a Capital Harvest Finance)
Company, a North Dakota corporation, individually)
and as agent for AGSCO, Inc.,)

Defendants/Appellees)

Farmers Union Oil Company of Williston, a North)
Dakota cooperative association, Mon-Kota, Inc., a)
Montana corporation, Betaseed, Inc., a Minnesota)
corporation, Central Insurance Agency, a North)
Dakota Corporation, Steven D. Cayko, a/k/a Steve)
Cayko, Perry Elletson a/k/a Perry E. Elletson, Ron)
Gross, a/k/a Ronnie Gross, Edward P. Ochs, a/ka)
Eddie Ochs, Tom Ochs, Mark Brunelle, Kelly)
Brunelle and Bill Sheldon,)

Supreme Court No. 20060174

Defendants)

and)

Farmers Union Oil Company of Williston, a North)
Dakota Cooperative association,)

Third-Party Plaintiff)

vs.)

Hardy Farms, Inc. and Jim Hardy,)

Third-Party Defendants.)



APPELLES' PETITION FOR REHEARING

ON APPEAL FROM (1) ORDER DATED MARCH 30, 2004, GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT, (2) JUDGMENT UPON ORDER GRANTING MOTION FOR FINAL SUMMARY JUDGMENT IN FAVOR OF AGSCO/CAPITAL HARVEST ON IT'S PRIORITY AGRICULTURAL LIEN DATED JANUARY 27, 2006, AND (3) ORDER DENYING PLAINTIFF'S REQUEST FOR SANCTIONS, DENYING PLAINTIFF'S MOTION TO STAY ENFORCEMENT OF JUDGMENT, DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT, AND DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT OR ORDER DATED MAY 24, 2006.

IN DISTRICT COURT NORTHWEST JUDICIAL DISTRICT MCKENZIE COUNTY
THE HONORABLE GERALD H. RUSTAD PRESIDING

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INTRODUCTION

¶1 Appellees, AGSCO, Inc. and Capital Harvest, Inc. as agent for AGSCO, Inc. hereafter collectively “AGSCO” file this Petition for Rehearing pursuant to Rule 40, N.D.R.App.P.

AGSCO adopt, reinstate, and incorporate by reference, their Brief, and Appendix on file with the Supreme Court (“Court”).

¶2 During the 2002 growing season, AGSCO sold \$536,582.24 in agricultural chemicals and services to Hardy Farm. Over the course of 2002, the chemical was applied to crops grown in North Dakota and Montana. On October 30, 2002, AGSCO filed a nonconsensual agricultural supplier’s lien pursuant to N.D.C.C. § 35-31-02 on all alfalfa, corn, barley, wheat, potatoes, and sugar beet crops located in McKenzie County. Appellant, Stockman Bank of Montana hereafter Stockman Bank, had loaned money to Hardy Farms for the 2002 growing season. Stockman Bank collected the proceeds from the sale of Hardy Farm crops and deposited them in North Dakota and Montana courts challenging all liens. The district court in North Dakota awarded AGSCO summary judgment on their lien finding that their lien was valid against all crops in North Dakota regardless of where the chemical sold to Hardy Farm was applied.

¶3 Upon appeal this Court concluded that the agricultural supplier’s lien statute provides an agricultural supplier’s lien if the agricultural supplies were furnished to the producer within 120 days before the filing of the lien and if the supplies were applied to crops in North Dakota. The court concluded that the trial court’s ruling that the North Dakota agricultural supplier’s lien applied to all crops in North Dakota regardless of where the chemical was sprayed was erroneous. Accordingly, the Court reversed the judgment of the trial court and remanded the matter for a determination of the allocation of the chemicals between Montana and North Dakota.

¶4 After the district court granted final summary judgment for AGSCO, AGSCO applied for the funds awarded to them in the judgment. The court released the funds to AGSCO. The district court denied Stockman Bank's attempt to require AGSCO to return the funds. This Court ruled that the district court did not err in refusing to grant the Appellant's motion but that the district court could revisit the issue.

¶5 This Petition shall state the points of law or fact that the Court has overlooked or misapprehended in reaching its conclusions.

ARGUMENT

I. AGRICULTURAL SUPPLIER'S LIEN

¶6 The agricultural supplier's lien law is remedial and should be liberally construed so as to protect those contributing labor, skill or materials. Stockman Bank v. AGSCO, 2007 ND 26, ¶ 18. Under such liberal construction, and in accord with the literal language of the statute, AGSCO/Capital Harvest is entitled to a lien on all of the crops grown by Hardy Farms in North Dakota. N.D.C.C. § 35-31-01 allows a supplier of agricultural chemical a lien upon the crops. Prior to its repeal in 1987, N.D.C.C. § 35-09-01 explicitly stated that agricultural supplier's liens are limited to "the crop produced from the fertilizer [or] farm chemicals." In re Glinz, 46 B.R. 266, 273-74 (Bankr. N.D. 1984) (citing N.D.C.C. § 35-09-01). When the legislature repealed N.D.C.C. § 35-09-01, the new legislation omitted the explicit requirements. See N.D.C.C. § 35-31-01. Gone was the language that liens were limited to "the crop produced from the fertilizer [or] farm chemicals." The omission is both practical and equitable.

¶7 An agricultural supplier loses control over the agricultural chemical once it is sold, and the supplier has no idea what happens to the chemical upon its sale. The nature of the supplier's lien is that it is non-consensual. N.D.C.C. ch. 35-31. The supplier does not have the ability or

the right to agree to have a lien placed upon the grower's crops. Id. Rather the nature of the process is adversarial. Once the supplier files a lien it is common for the grower to be upset. Cooperation at this point is minimal with the grower. While the supplier most likely will have a good idea where the grower actually farms, the supplier will be unable to get information as to where and how much of the agricultural chemical was applied. Requiring the supplier prove where the agricultural chemical was applied puts the supplier at a serious disadvantage. A non-cooperative grower could effectively challenge the lien requiring the supplier to prove where the product was applied. The record keeping responsibility is in the hands of the party that would be disadvantaged by a lien. The legislature surely wanted to avoid this situation.

¶8 In addition to the difficulty of proving where the chemical was applied, there is an issue where the chemical is not applied at all. Once the supplier sells the chemical the supplier has no knowledge of what happens to the chemical. The chemical could be sold again to a neighbor. The grower may use part of the chemical and store some for the following year. The grower could have a spill and the chemical simply wasted. From the grower's perspective there is no difference between chemical applied to crops in another state and chemical simply not applied at all. In both situations the chemical is not applied to North Dakota crops. While allowing a lien on North Dakota crops without regard to where the chemical was applied or whether it was applied at all is inexact, it is practical.

¶9 Stockman Bank argued that this interpretation of the lien law could result in a double recovery. The facts are clear that no double recovery has taken place on behalf of AGSCO. AGSCO supplied over \$500,000 worth of chemical to Hardy Farms. The amount awarded in both courts does not add up to \$500,000. The specter of a double recovery in this case is one of the appellants own making. North Dakota law defines a lien as "a charge imposed upon specific

property by which it is made security for the performance of an act.” N.D.C.C. § 35-01-02. A lienor may be in a position where the lien amount is greater than the amount owed, See N.D.C.C. § 35-01-23 (stating “The partial performance of an act secured by a lien does not extinguish the lien upon any part of the property subject thereto even if it is divisible.”) The process for recovering the money owed secured by a lien precludes a party from obtaining more than what is owed. See N.D.C.C. § 35-20-05 (requiring a determination for the amount owed).

¶10 The supplier liens of North Dakota and Montana could potentially protect a supplier for supplies sold and used in the other’s state. However, the lien in each state would only apply to the crops in that respective state. AGSCO filed a lien in each state for \$500,000 precisely because they had no way of determining where Hardy Farm would apply the chemical sold. However, AGSCO has never asserted that they had the right to proceeds greater than what is owed to them. Stockman Bank chose to split the proceeds between two jurisdictions, Montana and North Dakota, despite all the crops being sold in Montana. Either state could have asserted jurisdiction over all the funds and applied the appropriate choice of law. Stockman Bank chose to have two separate actions in separate states creating the issue of inconsistent decisions.

¶11 In its decision the Court has construed N.D.C.C. ch. 35-31 to apply only to liens on crops in this state. We agree that N.D.C.C. ch 35-31 should apply to crops in this state. However we disagree that N.D.C.C. § 35-31-01 applies only to chemical that was sprayed on crops in this state. The statute does not require the chemical to be applied in this state or even applied at all. The act of furnishing the chemical is enough to trigger the lien under N.D.C.C. § 35-31-01. What the grower does with the chemical – where it is sprayed, whether it is sprayed, whether it is resold – upon its purchase is something that the supplier will not know or control. The statute

does not require the supplier to prove what becomes of the chemical. Such a burden upon the supplier could eviscerate the supplier's lien altogether.

¶12 In repealing N.D.C.C. § 35-09-01, the legislature removed the requirement of matching up the chemical with the crop upon which it was sprayed. Matching up chemical to the crop upon which it is applied is difficult if not impossible in many instances. Additionally, the dynamics between the grower and the supplier makes it even more difficult to determine how much and where any certain chemical is applied. The legislature's change of the agricultural supplier's lien removed these problems. While the lien law still applies to crops grown in North Dakota, proving where the chemical was applied is an extra burden that the legislature did not require in the lien law. The Court should not now require suppliers to carry this extra burden.

II. DEPOSIT IN COURT

¶13 The second issue addressed in this petition is whether the district court has the authority to order AGSCO to return funds to the district court that were paid out to AGSCO pursuant to the district court's order. This Court has stated,


The power of the court over moneys in its custody continues until they are distributed pursuant to final decrees in the cases in which the moneys are paid, and if from any cause such moneys are previously withdrawn *without authority* of law, the court can by summary proceedings, compel their restitution.

Agricultural Bond & Credit Corporation v. Courtenay Farmers Co-op, Ass'n, 66 ND 122, 262 N.W. 453, 457 (N.D. 1935) (emphasis added). However, once a decree of distribution is entered and enforced, the power of the court to compel restitution is gone. See id. In this case AGSCO acquired the money pursuant to the district court's order – under the authority of law. The district court now no longer has the authority to compel restitution of the funds. Id.

III. CONCLUSION

¶14 Upon further consideration, AGSCO respectfully asserts the Judgment of the Trial Court should be upheld.

Respectfully submitted this 14th day of March 2007.

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